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No. 94-1150

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1994

ALSTON R. KEENER,
Petitioner,

v.

EXXON COMPANY, U.S.A., and EXXON CORPORATION,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This case concerns the nonrenewal of petitioner's gasoline station lease and franchise. That franchise nonrenewal was governed by the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (1994) ("PMPA"). The PMPA permits nonrenewals in a wide variety of circumstances, including those in which the franchisor decides to sell the gasoline station property the franchisee leases from the franchisor and then extends to the franchisee a right of first refusal of a third party's offer to purchase the gasoline station property. This case presents a single legal question:

Did the Fourth Circuit properly conclude, as other circuit courts have previously concluded, that a valid right of first refusal under the PMPA is extended when the franchisor offers to sell the leased gasoline station property to the franchisee at the identical price bid by another person for that same gasoline station property?

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STATEMENT OF THE CASE

A. Introduction

This is a simple gasoline service station nonrenewal case. It concerns the nonrenewal of a franchise relationship whereby petitioner Keener had leased and operated an Exxon-owned service station. Keener asserts that, when

Exxon nonrenewed its franchise relationship with him and sold the service station it formerly had leased to him, Exxon did not give him a right of first refusal in compliance with the PMPA. Keener's contention has been rejected by both the district court and the Fourth Circuit. There are no issues to be reviewed by the Supreme Court. The petition should be denied.

B. Factual Background

In 1984, Exxon selected and purchased a corner lot on a busy commercial street near an interstate highway interchange in the Sabraton section of Morgantown, West Virginia. (Fourth Circuit Appendix ("CA4 App.") 57.) It built a new gasoline station upon that lot. After the station was built, Keener leased the station from Exxon and became the Exxon franchisee at the station. *(Id.)* The station was successful; it was located in a high-traffic area, had a modern facility built by Exxon, and had a high volume of gasoline sales. (CA4 App. 58.) Keener's sole financial obligations to Exxon were to pay monthly rent and to pay for the gasoline and other products he purchased from Exxon. *(Id.)* Keener paid no franchise fee to become an Exxon dealer at the station. *(Id.)*

Subsequently, Exxon decided to sell the Sabraton station premises as part of its business decision to distribute motor fuel in certain markets, including parts of West Virginia, through independent distributors rather than serving those markets using an Exxon-owned distribution system. (CA4 App. 452-57; 459-60; 484-85; 489-90; 511-14.) Exxon's business decision was made in order to serve those markets more efficiently and thus increase Exxon's ability to compete in those markets. *(Id.)*

In accordance with its decision, Exxon notified Keener that Exxon would not renew the franchise relationship. (CA4 App. 58-59; 242; 247.) Exxon solicited

bids for the station from six potential purchasers. While the bid solicitations were in the hands of the potential bidders, Keener started a bidding war over the Sabraton station premises by attempting to intimidate potential bidders. Prior to the submission of bids, he sent each of the potential bidders a letter that stated: "I fully intend to buy my store. Any bid over the appraisal price only runs up the price of my goal to own my business lock, stock and barrel." (CA4 App. 510.)

Three of the potential bidders, each of whom was an Exxon distributor, submitted bids. As part of its bid solicitation, Exxon informed potential purchasers that (1) the minimum bid acceptable to Exxon was $547,000, and (2) they would have to grant Exxon an option to repurchase the station if, during the first twenty-one years after the sale, Exxon-brand motor fuel was no longer offered for sale at the station. *(Id.)* Joe DeFazio Oil Company ("DeFazio") submitted a bid totalling $1,200,010 for the service station premises. (CA4 App. 60; 175.) This was the highest bid received by Exxon in the competitive bid process. (CA4 App. 60.)

Exxon offered Keener a sixty-day right of first refusal to buy the station premises pursuant to Section 2802(b)(3)(D)(iii)(II) of the PMPA. (CA4 App. 60-61; 242-43; 250-65.) The right of first refusal offered the station to Keener on terms identical to those offered by the highest bidder to purchase the station. (CA4 App. 107-137.) As the district court found, "Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio." (App. to Pet. for Cert. 21a)(emphasis added). In addition, Keener was given the choice of not providing Exxon with a repurchase option in the event Keener decided to stop selling Exxon gasoline at the station during the first twenty-one years after the purchase of the station. (CA4 App. 60-61; 242-43; 250-65.) Accordingly, as found by the district court, "[t]he deal

offered to Keener was thus more advantageous to Keener." (App. to Pet. for Cert. 22a.)

Even though Exxon was nonrenewing its direct-served franchise with Keener, he still had the option of continuing to purchase Exxon-branded motor fuel from any of the six Exxon-branded distributors serving the Morgantown, West Virginia area. (CA4 App. 292.) An agreement with any of those distributors would have enabled Keener to retain and display the Exxon brand. (*See* CA4 App. 268-69; 282; 285.) Keener negotiated a deal with at least two of those distributors to supply him with Exxon-brand gasoline if he bought the Sabraton station. (CA4 App. 282-84; 285-86.)

The district court expressly found that "the undisputed evidence shows that Keener could have operated the station as an Exxon station, though not as an Exxon franchisee himself, for at least the same costs he incurred as a franchisee." (App. to Pet. for Cert. 23a.) Despite being able to retain the Exxon brand and operate the station as an Exxon station, the district court found that "Keener elected not to exercise his right of first refusal and not to match the highest bid for the station." (*Id.*)

After Keener declined the right of first refusal to purchase the station, Exxon proceeded to sell the station premises. (C.A.4 App. 61; 176.) The sale closed on October 2, 1992. (*Id.*) As the real estate documents make clear, this transaction was a sale of realty and equipment. In exchange for $1,142,819, Exxon conveyed by special warranty deed a service station building and the improvements and a certain tract of land. (CA4 App. 61-62; 176-77.) In exchange for $57,111, Exxon also conveyed certain equipment at the station. (*Id.*) The service station equipment included an air compressor, lifts, pumps, and underground gasoline storage tanks. (*Id.*) No part of the purchase price of $1,200,010 was for the purchase of an Exxon franchise or the payment of any franchise fee or a gasoline supply commitment. (*Id.*) Exxon

did not sell the right to purchase Exxon-brand motor fuel. Exxon sold only the land, building and equipment described in the real estate documents. (CA4 App. 61-62; 121-73; 176-77; 204-39.)

C. Procedural History

Keener commenced this case in October 1992 in the Circuit Court of Monongalia County, West Virginia. Although Keener knew in advance that the sale of the service station premises was scheduled to close on October 1, 1992 (CA4 App. 54), he did not attempt to enjoin the sale. (CA4 App. 55-56.) It was not until after the purchase of the station premises had been consummated that Keener served his complaint on Exxon. The case was then removed to the United States District Court for the Northern District of West Virginia and transferred by consent to the District of Maryland. (CA4 App. 240.)

Keener's complaint prayed for two alternative forms of relief. Keener sought damages of $653,010 -- the difference between the purchase price of $1.2 million and his asserted "fair market value" of $547,000. (CA4 App. 54.) Alternatively, Keener sought a mandatory injunction compelling the purchaser to transfer ownership of the station to him for $547,000. (CA4 App. 54-55.) This was less than half of the $1.2 million the purchaser paid for the station as a result of competitive bidding. Keener did not seek resumption of his prior franchise relationship with Exxon.

Prior to discovery, Exxon moved for summary judgment. Keener responded by cross-moving for partial summary judgment. (CA4 App. 3.) The district court heard argument on the parties' cross-motions, but denied them both and ordered discovery to proceed. (CA4 App. 5-6.) The parties then conducted extensive discovery. All of the parties were deposed, numerous documents were

exchanged, and numerous interrogatories propounded and answered.

After the close of discovery, Exxon again moved for summary judgment. Keener again cross-moved for summary judgment. (*Id.*) Again, the parties extensively briefed their summary judgment motions. Exxon filed three briefs, and Keener filed two briefs. (CA4 App. 7-8.) Once again, Keener did not file an affidavit pursuant to Federal Rule of Civil Procedure 56(f) specifying any discovery that he claimed was necessary to enable him to oppose Exxon's summary judgment motion. Instead, he asserted that no genuine issues of material fact remained in the case. (Mem. in Opp. to Exxon's Mot. for Summ. Judg. and in Supp. of Keener's Cross-Mot. for Part. Summ. Judg. (filed on Nov. 8, 1993) at 2.)

The district court entered an order granting Exxon's motion for summary judgment and denying Keener's cross-motion for summary judgment. That order was supported by a seven-page memorandum, in which the district court properly concluded that Exxon fully complied with the PMPA when it nonrenewed its franchise relationship with Keener. (App. to Pet. for Cert. 17a-23a.) Specifically, the district court concluded that after "Exxon decided to sell the station and DeFazio submitted the highest of six bids," Keener received a "legitimate right of refusal under §2802(b)(3)(D)(iii)(II), which he elected not to exercise." (App. to Pet. for Cert. 21a, 23a.)

The district court also properly rejected Keener's argument that the PMPA precludes a franchisor from offering to sell its service station properties to the franchisor's distributors, and then providing the incumbent dealer with a right of first refusal of the high bid received. (App. to Pet. for Cert. 22a.) In rejecting this argument, the district court expressly found that "[t]here is nothing in the language of the PMPA suggesting that such an argument is meritorious." (App. to Pet. for Cert. 22a.) In addition, the

district court correctly ruled that Keener's position "is also contrary to the PMPA's purpose" which was to provide franchisors with "flexibility to improve efficiency through restructuring." (App. to Pet. for Cert. 22a.)

Keener then appealed to the Fourth Circuit, arguing that DeFazio had bid on a "bundle" of rights containing (1) title to the service station, (2) the right to use Exxon's trademark at the station, and (3) a guaranteed gasoline supply for the station. In a thorough opinion, the Fourth Circuit rejected his arguments. Specifically, the Fourth Circuit ruled that Exxon had produced evidence showing that it had offered to sell the service station property to Keener at the same price DeFazio had offered for it. (App. to Pet. for Cert. at 8a-9a.) Keener, on the other hand, failed to produce evidence sufficient to create a genuine issue of fact about whether Exxon had sold DeFazio a franchise and a gasoline commitment along with the station property. (App. to Pet. for Cert. at 9a-11a.)

MISSTATEMENTS IN THE PETITION

Keener's petition is wholly dependent upon two major misstatements. In accordance with Supreme Court Rule 15.1, Exxon notes these two major misstatements:

1. Keener continues to assert in this Court, as he did in the courts below, the erroneous factual proposition that the property covered by the right of first refusal extended to him was different from the property the third party (DeFazio) bid upon. Specifically, Keener contends that the right of first refusal extended to him covered only the service station premises, but that DeFazio bid upon, and Exxon sold to DeFazio, a "package" consisting of the service station premises, a gasoline supply commitment, and the right to use the Exxon trademark. (*E.g.*, Pet. for Cert. 5-7.) This factual contention is unsupported and incorrect.

Both the district court and the circuit court carefully considered and rejected this factual contention, finding that Keener was offered an opportunity to purchase the same property upon which DeFazio bid. The district court ruled that Exxon's right of first refusal complied with the PMPA because "Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio." (App. to Pet. for Cert. 21a-22a.) Similarly, the circuit court affirmed the district court's finding that Keener "had, in fact, been offered the opportunity to purchase Exxon's interest in the property on the same terms as DeFazio." (App. to Pet. for Cert. 5a.) Both courts considered and rejected Keener's "package" assertion, concluding that it was unsupported by evidence sufficient to create a genuine issue of fact. (App. to Pet. for Cert. 9a-13a.)

2. Keener also erroneously contends that the Fourth Circuit ruled that "the PMPA's obligation to extend a right of first refusal is presumptively satisfied so long as the price term of the offer to sell the premises to the franchisee is the same as the price term contained in a third party's bid, even where, as here, the third party's bid covers items in addition to the premises." (*E.g.*, Pet. for Cert. 13.) In other words, Keener misconstrues the Fourth Circuit's ruling to mean that a "same price" right of first refusal is presumptively also a "same property" right of first refusal.

Keener's construction is erroneous; the Fourth Circuit made clear that there was a presumption that Exxon had extended a valid right of first refusal to Keener not merely because the price terms of the two offers were the same, but also because both offers concerned the sale of the same property. Indeed, the Fourth Circuit specifically stated that: "[a]s a matter of basic logic, a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by the third party." (App. to Pet. for Cert. 9a, n.3) (emphasis added). It further clearly stated that there exists "a

presumption of statutory compliance where Exxon offered the same station for the same price." (App. to Pet. for Cert. 8a) (emphasis added).

In short, the presumption of statutory compliance adopted by the Fourth Circuit fully recognizes that there must be a "same price, same property" right of first refusal to satisfy the requirements of the PMPA. The presumption thus properly informs the district courts and franchisors in the marketplace what evidence is necessary to meet the burden of going forward to show that a valid right of first refusal was extended.

REASONS FOR DENYING THE WRIT

This is a simple dealer nonrenewal case in which petitioner Keener, a former Exxon franchisee, asserts that Exxon did not give him a right of first refusal in compliance with the Petroleum Marketing Practices Act, 15 U.S.C. §§2801 *et seq.* ("PMPA"). Keener's assertion is meritless and was flatly rejected by both courts below. Likewise, no basis for certiorari exists and his petition should be denied.

On cross-motions for summary judgment, the district court held that Exxon had offered Keener a valid right of first refusal, which Keener chose to reject. On appeal, the Fourth Circuit found that Exxon had extended to Keener a valid right of first refusal and affirmed the district court's judgment. Both tribunals found the material facts undisputed. Before the station was sold to the highest bidder, Exxon had offered Keener a right of first refusal to match the highest bid Exxon received. Accordingly, both tribunals held that the nonrenewal of the franchise and the sale of the station premises were proper and lawful, and that the PMPA did not entitle Keener to the windfall he sought.

Both the district court and the Fourth Circuit found that Exxon demonstrated that there was no genuine issue

that Exxon had offered to sell to Keener exactly what the highest bidder had offered to buy from Exxon -- the service station premises -- at exactly the same price that the highest bidder had offered -- $1.2 million. Both the district court and the court of appeals found that Keener had failed to introduce evidence sufficient to raise a triable issue under Rule 56, Fed. R. Civ. P., about whether the offers were the same. Accordingly, summary judgment was properly granted and affirmed.

Keener's petition for certiorari lacks merit. Having failed to convince two separate tribunals that the offers were different, he now ignores their findings. His petition merely assumes that the offers were different, which is a critical fact he failed to establish below. Keener then asserts that, because the offers were different, the Fourth Circuit in order to affirm summary judgment for Exxon created a "'strong presumption' that a right of first refusal is extended anytime the offering prices are the same." (Pet. for Cert. 14.) From this unsupported premise, petitioner then argues that the Fourth Circuit's decision creates a circuit split and contradicts the intent of Congress in the PMPA. (*E.g.*, Pet. for Cert. 18.)

Keener's petition is fatally flawed because his fundamental factual premise -- that the offers were different -- has no basis. It simply ignores the finding of both the district court and the Fourth Circuit that the right of first refusal extended to him was the same as DeFazio's offer to Exxon. The district court ruled that Exxon's right of first refusal complied with the PMPA because "Keener was offered the right of first refusal to purchase Exxon's interest in the property, station and equipment for the same terms as DeFazio." (App. to Pet. for Cert. 21a-22a.) Similarly, the circuit court affirmed the district court's finding that Keener "had, in fact, been offered the opportunity to purchase Exxon's interest in the property on the same terms as DeFazio." (App. to Pet. for Cert. 5a.)

Keener's fundamental legal premise -- that the Fourth Circuit created a "'strong presumption' that a right of first refusal is extended anytime the offering prices are the same" (Pet. for Cert. 14) -- is also flatly wrong. The Fourth Circuit stated that there exists "a presumption of statutory compliance where Exxon offered the same station for the same price." (App. to Pet. for Cert. 8a) (emphasis added). Indeed, the Fourth Circuit further emphasized that "[a]s a matter of basic logic, a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by the third party." (App. to Pet. for Cert. 9a, n.3) (emphasis added).

In short, the Fourth Circuit created neither an impermissible statutory presumption nor a conflict in the circuit courts. Keener seeks review by this Court by misreading the Fourth Circuit's opinion and ignoring the undisputed facts. No basis for certiorari exists. His petition should be denied.

I. THE FOURTH CIRCUIT DID NOT CREATE AN IMPERMISSIBLE PRESUMPTION OF FRANCHISOR COMPLIANCE WITH THE PETROLEUM MARKETING PRACTICES ACT

A. The Fourth Circuit Properly Ruled That Under The Petroleum Marketing Practices Act There Is a Presumption That A Valid Right Of First Refusal Is Extended When The Franchisor Offers To Sell To The Franchisee The Same Property At The Same Price Bid By A Third Party

This is a service station dealer nonrenewal case. The sole legal issue presented below was whether Exxon followed the procedure set forth in the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* ("PMPA"), when a franchisor decides to sell a service station premises which it

owns. Both the district court and the Fourth Circuit correctly concluded that Keener was accorded the statutory rights given to him by Congress under the PMPA. There is no merit to Keener's contention that the court of appeals created a presumption that contradicts the PMPA's statutory allocation of the burden of going forward with evidence.

In enacting the PMPA, Congress struck a balance between the interests of franchisees and franchisors. Congress elected not to provide franchisees with complete protection against termination or nonrenewal. As stated by several federal appellate courts, the PMPA "does not provide a franchise with total protection against termination." *E.g., Humboldt Oil Co. v. Exxon Co.*, 695 F.2d 386, 389 (9th Cir. 1982). The cases and legislative history make clear that the PMPA's purpose was to "strike a balance between the at times conflicting interests" of the franchisee and franchisor and allow the franchisor to meet changing circumstances in the marketplace. S. Rep. No. 731, 95th Cong., 2d Sess. 15 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 874.

Congress specifically noted that "[p]articularly important is that legislation dealing with this subject recognize the importance of providing adequate flexibility so that franchisors may initiate changes in their marketing activities to respond to changing market conditions and consumer preferences." *Id.* at 19, 1978 U.S.C.C.A.N. at 877. In accordance with these concerns, Congress directed courts not to second-guess franchisors' marketing decisions. *E.g., Massey v. Exxon Corp.*, 942 F.2d 340, 345 (6th Cir. 1991) (Congress intended the PMPA to "avoid judicial scrutiny of the business judgment" of the franchisor and thus it is not necessary for the courts to determine whether "a particular marketing strategy" is a "wise business decision"); *O'Shea v. Amoco Oil Co.*, 886 F.2d 584, 588 (3d Cir. 1989) ("The PMPA is not designed to eliminate the petroleum companies' ability to set their own marketing strategies"; instead, "the PMPA is designed to accord flexibility to the petroleum companies to

refine their marketing strategies and change them in response to changed conditions."); *Darling v. Mobil Oil Corp.*, 864 F.2d 981, 984 (2d Cir. 1989) (PMPA is designed "to enable the franchisor to respond effectively to changing market conditions in a given geographic region.").

The PMPA therefore sets forth certain grounds under which termination or nonrenewal is proper. At issue here was Section 2802(b)(3)(D) of the PMPA, which permits nonrenewal where, as here, two conditions are met. First, the franchisor makes a decision in good faith and in the normal course of business to sell the service station premises. Keener does not challenge Exxon's decision to sell the station. Second, the franchisor offers the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase the service station premises.

The undisputed facts demonstrate that Exxon fully complied with this provision of the PMPA. In 1991, Exxon decided that under current market conditions it could more efficiently distribute motor fuel in certain markets, including parts of West Virginia, through independent distributors rather than serving those markets directly itself. Implementation of that business decision required Exxon to sell a number of service stations, including a very successful station which Exxon leased to Keener. Exxon provided Keener with a notice of nonrenewal and informed him that he would be given a right of first refusal as provided by the PMPA. In connection with the nonrenewal, Exxon requested six potential purchasers, all of whom were Exxon distributors, to bid on the station premises. DeFazio submitted the highest bid, which was for $1.2 million. In accordance with the PMPA, Exxon gave Keener an opportunity to match that bid. Keener decided not to do so. Accordingly, Exxon sold the station to the highest bidder. Keener then sought a windfall in court: he filed suit seeking to force the sale of the station to him for $547,000 -- less than one-half of the station's purchase price as determined in the competitive bidding process.

Both Exxon and Keener filed motions for summary judgment in the district court. Both parties argued that there was no genuine issue of material fact and that the issue of Exxon's compliance with the PMPA should be decided as a question of law. The district court held that Exxon had offered Keener a valid right of first refusal, which Keener chose to reject. (App. to Pet. for Cert. 21a-23a.) On appeal, the Fourth Circuit found that Exxon had extended to Keener a valid right of first refusal and affirmed the district court's judgment. (App. to Pet. for Cert. 5a, 8a-13a.)

Both tribunals found the material facts undisputed. Before the station was sold to the highest bidder, Exxon had offered Keener a right of first refusal to match the highest bid Exxon received. Both the district court and the court of appeals found that Exxon had demonstrated that there was no genuine issue that Exxon had offered to sell to Keener exactly what the highest bidder had offered to buy from Exxon -- the service station premises -- at exactly the same price that the highest bidder had offered -- $1.2 million. The Fourth Circuit expressly found, as did the district court (App. to Pet. for Cert. 21a), that the right of first refusal extended by Exxon to Keener was identical to the offer made by DeFazio to Exxon:

- "the franchisor . . . offered the franchisee the station at the same price bid by a third party." (App. to Pet. for Cert. 3a.)

- "the district court found that [Keener] had, in fact, been offered the opportunity to purchase Exxon's interest in the

property on the same terms as DeFazio." (App. to Pet. for Cert. 5a.)[1]

Both the district court and the court of appeals found that Keener had failed to introduce evidence sufficient to raise a triable issue under Rule 56, Fed. R. Civ. P., about whether the offers were the same. (App. to Pet. for Cert. 21a-23a (no factual issues in dispute) (district court opinion); App. to Pet. for Cert. 13a ("Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision.") (Fourth Circuit opinion).) Accordingly, summary judgment was properly granted and affirmed.

In the Fourth Circuit, Keener presented a legal argument that the PMPA required more than an identity between the terms of Exxon's right of first refusal and the terms of the third party's offer. According to Keener, the PMPA requires an economic analysis to ensure that the right of first refusal is the "economic equivalent" -- a term notably absent from the PMPA -- of the third party's offer. Keener contended that Exxon's right of first refusal was not the "economic equivalent" of DeFazio's bid because DeFazio, as an Exxon distributor, had an economic advantage over him. In effect, Keener sought to prohibit the sale of service stations to distributors -- a prohibition not found in the PMPA. The Fourth Circuit (as did the district court below) rejected Keener's unfounded argument, stating that "the PMPA does not prohibit the sale of stations to distributors, and federal courts are not in the business of equalizing all advantages on the market's playing field." (App. to Pet. for Cert. 10a.)

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[1] The sole difference between the two offers is that Keener was given the choice of not providing Exxon with an option to repurchase the station. (App. to Pet. for Cert. 4a-5a.) That difference, the district court found, made the terms of the offer to Keener more advantageous than the bid by DeFazio Oil. (*Id.* 5a.)

The Fourth Circuit concluded that Exxon had complied with the PMPA, reasoning that "a valid right of first refusal would seem presumptively extended when the same property is offered the franchisee at the identical price bid by a third party." (App. to Pet. for Cert. 9a, n.3.) Accordingly, the Fourth Circuit held that where, as here, a franchisor extends to a franchisee a right of first refusal to purchase "the same station for the same price" as bid by the third party, a presumption of statutory compliance exists. (App. to Pet. for Cert. 8a.)

The Fourth Circuit's presumption properly recognizes that there must be a "same price, same property" right of first refusal to satisfy the statutory requirements of the PMPA. The presumption of statutory compliance adopted by the Fourth Circuit correctly relieves franchisors (like Exxon) of the extraordinary burden not intended by Congress of proving that the right of first refusal is the "economic equivalent" of the third party's bid. The presumption likewise makes it unnecessary for district courts to bear the burden of supervising the sort of detailed economic analysis sought by Keener. Such analysis would have the deleterious effects of intruding on business operations, prolonging litigation, and requiring courts to second-guess private sector business decisions. (App. to Pet. for Cert. 6a-7a.) Congress did not intend for the PMPA to have such results.

In addition, the Fourth Circuit held that Keener failed to show a genuine issue of fact sufficient to overcome the presumption that Exxon's "same price, same property" right of first refusal complied with the PMPA. (App. to Pet. for Cert. 13a.) Keener contended, without basis, that Exxon sold DeFazio both a gasoline supply commitment and the station premises, but that Exxon offered him only the opportunity to buy the station. (App. to Pet. for Cert. 9a-10a.) The Fourth Circuit (and the district court) properly rejected the arguments Keener offered in support of this contention. Summary judgment was granted in the district court --

which did not apply a presumption -- because there was no genuine issue of material fact and Exxon was entitled to judgment as a matter of law. Keener, who cross-moved for summary judgment, failed to introduce sufficient evidence to raise a genuine issue of fact about the identity of the terms of the third-party offer and the right of first refusal. (App. to Pet. for Cert. 21a-23a) ("no factual issues are in dispute and Exxon is entitled to summary judgment as a matter of law."). Summary judgment was affirmed because Keener again failed to identify any genuine issue of material fact. (App. to Pet. for Cert. 13a) ("Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision.")

The Fourth Circuit (as did the district court) carefully considered Keener's factual showing, which the Fourth Circuit classified as "minimal." Both courts properly concluded that it was insufficient to avoid summary judgment. *E.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) ("If the [opponent's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (to avoid summary judgment, opponent must do more than "simply show that there is some metaphysical doubt about the material facts").

B. Keener Misreads The Fourth Circuit's Opinion As Creating A Presumption That Obviates The Need For Proof That The Property Offered For Sale To The Franchisee Was The Same Property Bid Upon By The Third Party

According to Keener, the Fourth Circuit ruled that, if the right of first refusal's price term was the same as the price term of the third party's offer, then the property offered for sale to the franchisee must be presumed to be the

same as the property upon which the third party bid. (*E.g.*, Pet. for Cert. 14.) In other words, Keener asserts that the Fourth Circuit ruled that a "same price" offer is presumptively also a "same property" offer, thus excusing the franchisor from introducing proof that it extended a "same property, same price" offer to the franchisee. (*Id.*) Keener's assertion is totally unfounded and distorts the Fourth Circuit's opinion.

Contrary to what Keener is telling this Court, the Fourth Circuit actually ruled that if "the same property is offered the franchisee at the identical price bid by a third party," then "a valid right of first refusal would seem presumptively extended." (App. to Pet. for Cert. 9a, n.3) (emphasis added). Indeed, the Fourth Circuit, as did the district court, ruled that Exxon had extended to Keener a right of first refusal to purchase "the same station for the same price" bid by a third party. (App. to Pet. for Cert. 8a) (emphasis added). Thus, the Fourth Circuit ruling did not excuse Exxon from demonstrating that it had extended a "same property, same price" right of first refusal to Keener.

The Fourth Circuit's presumption of statutory compliance fully recognizes that a "same price, same property" right of first refusal must be extended to a franchisee to satisfy the requirements for a valid right of first refusal under the PMPA. Thus, the presumption properly informs the district courts and franchisors in the marketplace what evidence is necessary to meet the burden of going forward to show that a valid right of first refusal was extended to the franchisee. The presumption precludes the sort of detailed economic analysis Keener seeks to engraft onto the PMPA, which would burden franchisors and courts with exhaustive economic analysis to determine whether the third party's offer and the right of first refusal were "economic equivalents."

In another misconstruction of the Fourth Circuit's opinion, Keener also asserts that the presumption

impermissibly alters the burden of proof under the PMPA. (Pet. for Cert. 19-24.) To the contrary, the presumption does not in any way shift the burden of proof. Instead, it properly identifies the proof required on the part of a franchisor under Section 2805(c) of the PMPA of "going forward with evidence to establish as an affirmative defense" compliance with the right of first refusal provision of the PMPA. Specifically, the presumption required proof by Exxon that the price and property terms of the right of first refusal extended to Keener were the same as the price and property terms of the third party's offer to Exxon. Exxon clearly met this burden of proof. (App. to Pet. for Cert. 13a; 23a.) Keener was free to rebut this evidence, but failed to do so. (*Id.*) No basis for certiorari exists.

II. THE FOURTH CIRCUIT IS NOT IN CONFLICT WITH ANY OTHER CIRCUIT COURT OF APPEALS

To create the misimpression that there is a basis for review by this Court, Keener incorrectly asserts that the Fourth Circuit's ruling conflicts with rulings of the Ninth and Second Circuits. (Pet. for Cert. 14-18.) Specifically, Keener asserts that although the Second and Ninth Circuits require proof that the franchisee was offered an opportunity to purchase at the "same price" the "same property" bid upon by a third party, the Fourth Circuit only requires proof that the franchisee was offered an opportunity to purchase some property at the "same price" bid by the third party, regardless of whether that property was the "same property" bid upon by the third party. (*Id.*)

Keener's assertion is totally meritless. As demonstrated above, it is premised on a fundamental misreading of the Fourth Circuit's opinion. The Second, Fourth and Ninth Circuit Courts of Appeals all recognize the same rule: a "same price, same property" offer is a valid right of first refusal under the PMPA. Keener lost in the

courts below because Exxon established that it had extended a "same price, same property" offer to him, and Keener failed to adduce evidence sufficient to create a genuine issue of fact about whether the property offered for sale was the "same." The result in this case would have been the same regardless of whether this case had been brought in the Second, Fourth, or Ninth Circuits.

A. The Circuit Courts Of Appeals Have Ruled That A "Same Property, Same Price" Offer Is A Valid Right Of First Refusal

1. The Fourth Circuit

As demonstrated above, and contrary to Keener's assertion, the Fourth Circuit's ruling did not create a presumption that enabled Exxon to prevail in the absence of proof that the property it had offered to sell to Keener was the same property upon which the third party had bid. Instead, the Fourth Circuit affirmed the district court's finding that Exxon had extended to Keener a right of first refusal to purchase "the same station for the same price" bid by a third party. (App. to Pet. for Cert. 8a.) Accordingly, the Fourth Circuit concluded that Exxon had complied with the PMPA, reasoning that "a valid right of first refusal would seem presumptively extended when the same property is offered the franchise at the identical price bid by a third party." (App. to Pet. for Cert. 9a, n.3) (emphasis added). The Fourth Circuit's ruling fully recognizes that a "same price, same property" right of first refusal must be extended to a franchisee to establish a valid right of first refusal under the PMPA.

2. The Second and Ninth Circuits

Both the Second and Ninth Circuits had similarly ruled that a "same property, same price" offer is a valid

right of first refusal under the PMPA. Specifically, the Ninth Circuit has ruled that

> When a third party's offer is in the form of a single transaction for cash, the court can justifiably infer that the amount of an arm's length offer represents the value of the station.

Ellis v. Mobil Oil, 969 F.2d 784, 786 (9th Cir. 1992). Similarly, the Second Circuit has approved the statement that "[a] right of first refusal is a right to buy on the same terms offered by a third party." *Atlantic Ave. Oil & Gas v. Texaco Ref. & Mktg. Inc.*, 699 F. Supp. 27, 31 (E.D.N.Y. 1988), *aff'd*, 870 F.2d 93 (2d Cir. 1989).

In short, there is no conflict among the circuits about the meaning of the term "right of first refusal" under the PMPA. All three circuit courts of appeals which have addressed this issue have similarly concluded that a right of first refusal under the PMPA requires that the franchisor offer the franchisee an opportunity to buy the service station premises at the same price that a third party offered to pay for that same property. The Fourth Circuit's decision does not create a conflict.

B. Keener's Evidence Was Insufficient To Create A Genuine Issue Of Fact About Whether He Received A "Same Property, Same Price" Offer

The result in this case would have been the same in the Second and Ninth Circuits as the result that obtained in the Fourth Circuit: Keener would have lost. The rule in the Second and Ninth Circuits is the same as the rule in the Fourth Circuit: a "same property, same price" offer is a valid right of first refusal under the PMPA. Under this rule, Exxon extended to Keener a valid right of first refusal. Both the district court and the Fourth Circuit found that Exxon

established evidence that Keener was given a "same property, same price" offer. (App. to Pet. for Cert. 21a-22a (district court opinion); 9a-13a (Fourth Circuit opinion).)

Keener, on the other hand, failed to adduce evidence sufficient to create a genuine issue of fact about whether the property he was offered an opportunity to purchase was the same as the property the third party offered to purchase. The court of appeals -- as did the district court -- carefully considered Keener's factual showing, which the court of appeals classified as "minimal." Both courts properly concluded that it was insufficient to avoid summary judgment. (App. to Pet. for Cert. 21a-33a) ("no factual issues are in dispute and Exxon is entitled to summary judgment as a matter of law."). Summary judgment was affirmed because Keener failed to identify any genuine issue of material fact. (App. to Pet. for Cert. 13a) ("Keener's assertions thus fail to raise a triable question as to whether Exxon has complied with the PMPA's right of first refusal provision.")

In sum, there is no conflict among the circuits about what constitutes a valid right of first refusal under the PMPA. The circuits recognize the same rule: a "same property, same price" offer constitutes a valid right of first refusal under the PMPA. In this case, Exxon moved for summary judgment and adduced proof that it had extended a "same property, same price" offer to Keener. Keener failed to adduce evidence sufficient to raise a genuine issue of fact about whether the offer covered the "same property." Accordingly, summary judgment was affirmed by the Fourth Circuit, as it would have been in the Second and Ninth Circuits.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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